ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection	)	MD Docket No. 00-58
of Regulatory Fees for	)	
Fiscal Year 2000	)	
	)	
	)	
	)	

To: The Commission

REPLY COMMENTS OF COMSAT CORPORATION

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COMSAT Corporation ("COMSAT"), by its attorneys, hereby replies to the Comments submitted by GE American Communications, Inc. ("GE Americom") and PanAmSat Corporation ("PanAmSat") in response to the Commission's *Notice of Proposed Rulemaking* ("*FY 2000 NPRM*") in the above-captioned proceeding.[1] Invoking the *FY 2000 NPRM* and the ORBIT Act, both PanAmSat and GE Americom assume that the non-U.S.-licensed INTELSAT satellite system is now subject to FCC regulatory fees. Neither commenter, however, explains how such space stations can now, for the first time, be said to fall within the coverage of Section 9 of the Communications Act, 47 U.S.C. § 159.

Instead, building on their unfounded assumption that INTELSAT space stations are now susceptible to regulatory fees, both commenters propose that COMSAT—and COMSAT alone—

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[1] *Notice of Proposed Rulemaking, In re Assessment and Collection of Regulatory Fees for Fiscal Year 2000*, FCC 00-117, MD Docket No. 00-58, at ¶¶ 16-17 (rel. April 3, 2000) ("*FY 2000 NPRM*").

should be held responsible for paying such fees, notwithstanding that COMSAT does not operate the INTELSAT satellites, and utilizes only 17% of the system's capacity.

ARGUMENT

I. PanAmSat and GE Americom Fail To Justify Their Assumption That COMSAT Must Now Pay Section 9 Space Station Fees on Non-U.S.-Licensed INTELSAT Space Stations.

Both PanAmSat and GE Americom both blithely assume that COMSAT must now pay Section 9 space station fees on non-U.S.-licensed INTELSAT space stations. Neither commenter, however, justifies that assumption. In fact, Section 9—which has not been amended—continues not to apply to such facilities. Moreover, because the facilities at issue indisputably were not subject to regulatory fees on October 1, 1999, any attempt to impose such fees for FY 2000 would constitute unlawfully retroactive rulemaking.

A. PanAmSat and GE Americom Fail To Explain How INTELSAT Space Stations Now Fall Within The Coverage of Section 9, Given That Such Facilities Still Are Not Regulated Under "47 C.F.R. Part 25."

PanAmSat again argues that COMSAT's current regulatory fee payments do not adequately compensate the Commission for all of its costs incurred "in international satellite regulation." PanAmSat Comments at 2. Echoing PanAmSat, GE Americom claims that unless COMSAT pays Section 9 regulatory fees in connection with INTELSAT space stations, "GE Americom and other private companies . . . [will be] forced to pay costs attributable to the regulation of COMSAT." GE Americom Comments at 2.

Section 9, however, does not authorize the Commission to recover all of its costs incurred "in international satellite regulation." PanAmSat Comments at 2. Rather, Section 9 space station

fees may be assessed only to enable the Commission to recover its costs expended in regulating these stations as "Radio Facilities" pursuant to "(47 CFR Part 25)." 47 U.S.C. § 159(g) (table) (emphasis added). *See* COMSAT Comments at 3-4, 7-11. The INTELSAT satellites used by COMSAT are *not* licensed by the Commission pursuant to "47 CFR Part 25," nor are they regulated by the Commission in any way. *See id.* Accordingly, the Commission incurs no cost (apart from the costs that it already recovers through Section 8 application fees and Section 9 bearer circuit fees which COMSAT already pays) in regulating INTELSAT space stations as "radio facilities." *Cf.* H.R. Rep. No. 102-207, at 26 (1991) (stating that Section 9 fees may not be imposed on INTELSAT space stations because such facilities are *not* "directly licensed by the Commission under Title III of the Communications Act."), *incorporated by reference in* H.R. Conf. Rep. No. 103-213, at 499 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1188. For this reason, neither GE Americom's regulatory fees nor those paid by any other company have ever been used to reimburse the Commission for costs attributable to the regulation of COMSAT under Part 25 of the Commission's Rules. *Compare* GE Americom Comments at 2.

Moreover, COMSAT is not similarly situated to any entity that is subject to Section 9 space station fees. *Cf.* 47 U.S.C. § 642(c) (enacted Mar. 17, 2000) (FCC may impose regulatory fees on COMSAT only where the same regulatory fees are imposed on similarly situated entities providing similar services). Specifically, unlike entities that are subject to such fees, COMSAT does not own or operate any U.S.-licensed space station facilities (other than the two domestic space stations for which it does pay space station fees).

First, COMSAT's 20.42% investment share in INTELSAT does not constitute "ownership" of INTELSAT for Section 9 purposes. Rather, under ORBIT, COMSAT is now

little more than a "passive investor" in INTELSAT. *See* 47 U.S.C. § 641 (providing that other users and providers of telecommunications services may now obtain and provide INTELSAT space segment capacity directly from INTELSAT). The Commission has never assessed a Section 9 regulatory fee against such a passive investor, even where the investor's equity in a *licensed* facility was substantially greater than COMSAT's investment share in INTELSAT.[2]

Nor, for present purposes, are INTELSAT space stations similarly situated to U.S.-licensed facilities. Instead, because INTELSAT's "radio facilities" are neither licensed pursuant to Title III of the Communications Act nor regulated pursuant to "47 C.F.R. Part 25," INTELSAT may not be compelled to contribute to the costs of promulgating and enforcing the Commission's "Part 25" rules. In this regard, the non-U.S.-licensed INTELSAT space stations are more akin to foreign-licensed satellites (which also are not licensed under Title III or regulated under Part 25) than to U.S.-licensed satellites. *Cf. Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, 14 FCC Rcd 9868, ¶ 39 (1999) ("*FY 1999 Order*") (Commission may not recover costs of regulating "non-U.S. licensed satellite service providers who operate in the U.S." through Section 9 space station fees, because non-U.S.-licensed space stations are not licensed pursuant to Title III or Part 25); *see also* COMSAT Comments at 11-14.

For example, COMSAT's competitor Loral Space & Communications, Ltd. ("Loral") owns a 49% interest in the Mexican entity Satélites Mexicanos S.A. de C.V. ("Satmex"). *See*

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[2] For example, neither the Hughes Electronics Corporation ("Hughes") nor the General Motors Corporation ("GM") is liable for Section 9 regulatory fees in connection with PanAmSat's space station facilities, notwithstanding that Hughes, which is wholly owned by GM, has owned as much as 71.5% of PanAmSat's common stock. *See PanAmSat 1999 SEC Form 10-K*, at 39 (filed Mar. 29, 2000), *available online at* <http://www.sec.gov/Archives/edgar/data/1037388/0000950130-00-001701.txt> (visited May 4, 2000).

1998 Loral Space & Communications, Ltd. SEC Form 10-K, at 1, 7, 17, 32 (filed Mar. 31, 1999), *available on-line at* <http://www.sec.gov/Archives/edgar/data/1006269/0000950123-99-002897.txt> (discussing Loral's investment in, and control of, Satmex). Through its 49% interest in SatMex, Loral controls the Mexican-licensed "Solidaridad" satellites, which provide both domestic and international service in the United States.[3] COMSAT, in contrast, has only a 20.42% ownership interest in the INTELSAT system, which provides only international—and not domestic—service in the U.S. Clearly, COMSAT's provision of satellite communications services using non-U.S.-licensed INTELSAT satellites is "similar" to Loral's provision of such services using non-U.S.-licensed SatMex satellites. Accordingly, there is no basis for assessing Section 9 space station fees against COMSAT in connection with INTELSAT satellites but not assessing the same (or more) space station fees against Loral in connection with SatMex satellites. *Cf.* 47 U.S.C. § 642(c) (regulatory fees imposed on COMSAT must be similar to those imposed "on other entities providing similar services"). Since the FCC does not even propose to impose such fees on similarly situated U.S. companies (such as Loral) that serve the United States using non-U.S.-licensed satellites in which they have an equity interest, the FCC may not impose such fees on COMSAT.

Finally, to the extent that the Commission incurs some cost in overseeing COMSAT's Signatory activities in INTELSAT, the D.C. Circuit has squarely held that the FCC lacks

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[3] *See, e.g., Televisa Int'l, LLC*, 13 FCC Rcd 10074 (1997) (authorizing the Mexican-licensed "Solidaridad II" satellite to provide direct-to-home television service in the United States); *Crawford Communications, Inc.*, 10 FCC Rcd 149, at ¶ 2(f) (Telecomm. Div. 1995) (authorizing a U.S. company to "establish channels of communication between appropriately licensed earth stations in the United States and the Mexican Morelos and Solidaridad satellite systems").

authority to recover such costs. *See FY 1999 Order*, 14 FCC Rcd 9868, ¶ 38 ("the courts have ruled that we may not assess a fee upon COMSAT for its role in the administration of the INTELSAT and Inmarsat space stations.") (citing *COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997)). Neither GE Americom nor PanAmSat offers any legal basis for their suggestion that the Commission may revive the unlawful "Signatory Fee" merely by disguising it as an equally unlawful space station fee.

B. PanAmSat and GE Americom Fail To Rebut the Strong Presumption Against Retroactive Rulemaking.

PanAmSat and GE Americom seek to "assume away" the formidable legal barriers that prevent the Commission from imposing Section 9 regulatory fees retroactively on facilities that were not subject to such fees on the applicable cut-off date. Specifically, as a matter of long-standing and consistently applied Commission practice, regulatory fees are paid only by those entities that fell within the coverage of Section 9 on or before *October 1 of the prior calendar year*. *See, e.g.*, *Public Notice, FY 1999 International and Satellite Services Regulatory Fees*, at 3 (Aug. 2, 1999) (setting October 1, 1998 cut-off date for who must pay FY 1999 fees). Even assuming *arguendo* that the ORBIT Act did change the scope of Section 9 (which it did not, see pages 2-4, *supra*), the ORBIT Act was not yet in force on October 1, 1999, and INTELSAT space stations clearly did not fall within the coverage of Section 9 as of that date. Courts would strictly scrutinize any FCC rule purporting to apply the new statute retroactively. *See Bowen v.*

Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (strong presumption against retroactive rulemaking); *see also* COMSAT Comments at 22-23.[4]

II. Neither PanAmSat Nor GE Americom Explains Why Any Section 9 Fees Imposed Should Not Be Appropriately Prorated.

Both PanAmSat and GE Americom urge the Commission to assess regulatory fees against COMSAT in connection with all 17 INTELSAT space stations. Both commenters, however, conveniently ignore the fact that COMSAT neither owns nor operates any of those space stations. Nor do the commenters account for the fact that COMSAT currently utilizes no more than 17.01% of the space segment capacity of the INTELSAT system. Instead, PanAmSat and GE Americom propose that COMSAT should now pay over $2,300,000 per year[5] in annual Section 9 regulatory fees. This proposal, however, is based on erroneous assumptions about the nature of INTELSAT, COMSAT's role therein, and the text of the ORBIT Act. Accordingly, even assuming *arguendo* that a Section 9 regulatory fee were to be imposed, any such fee must be appropriately prorated.

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[4] Moreover, if the Commission decides to impose a fee notwithstanding that INTELSAT space stations clearly were not within the coverage of Section 9 on October 1, 1999, the Commission should, at the very least, prorate the fee to reflect only the portion of FY 2000 during which the ORBIT Act was actually in effect. *See* COMSAT Comments at 23.

[5] This computation assumes that COMSAT would pay a Section 9 space station fee of $94,650 on each of the 17 INTELSAT satellites, plus $717,875 in additional Section 9 regulatory fees. *See* COMSAT Comments at 20 (discussing the Section 9 regulatory fees on earth stations, international bearer circuits, and non-INTELSAT space stations that COMSAT will pay in FY 2000).

A. COMSAT Does Not Have Access To INTELSAT's Entire Fleet.

PanAmSat does not dispute that COMSAT uses only 17.01% of the satellite capacity of the INTELSAT system. Nonetheless, PanAmSat asserts that COMSAT somehow "has access to *100 percent* of the capacity on Intelsat's satellites. . . ." PanAmSat Comments at 2 (emphasis added). PanAmSat's fanciful suggestion is both erroneous and irrelevant.

As threshold matter, the Commission should recognize that if COMSAT "has access to 100 percent of the capacity on Intelsat's satellites," PanAmSat Comments at 2, then PanAmSat and every other "direct access" customer has precisely the same "access." Specifically, under ORBIT, all "users and providers of telecommunications services [may] obtain direct access to INTELSAT telecommunications services and space segment capacity through purchases of such capacity or services from INTELSAT." 47 U.S.C. § 641(a) (enacted Mar. 17, 2000). To date, COMSAT has forwarded to INTELSAT the names of more than 80 entities (including PanAmSat) eligible to obtain such direct access. Thus, if PanAmSat is correct, then it and all other entities eligible to obtain direct access share the same "access to 100 percent of the capacity on Intelsat's satellites" that COMSAT is alleged to enjoy, and should pay the same fees as COMSAT in connection with those satellites.[6]

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[6] Of course, the Commission has never interpreted Section 9 to impose regulatory fees based upon an entity's mere *potential* access to facilities, as opposed to *actual* use of those facilities. To the extent that COMSAT and other entities *actually* provide international telecommunications service using INTELSAT (or any other) space segment, COMSAT agrees that international circuit bearer regulatory fees are applicable. Indeed, PanAmSat's attempt to avoid paying such fees was rejected by the Commission, in a decision subsequently affirmed by the U.S. Court of Appeals. *See PanAmSat v. FCC*, 198 F.3d 890, 897-98 (D.C. Cir. 1999) (affirming in pertinent part the *FY 1998 Order*, 13 FCC Rcd 19820, 19837-39 (1998)).

In fact, however, no U.S. entity enjoys "access to 100 percent of the capacity on Intelsat's satellites." PanAmSat Comments at 2. Instead, even with respect to INTELSAT international traffic that is actually carried to or from the United States, COMSAT and other "direct access" users provide only the INTELSAT "half-circuit" that carries such traffic from the United States to an INTELSAT satellite (or vice versa). A separate, foreign carrier must provide the corresponding "half-circuit" that carries the call from the satellite to its ultimate foreign destination (or vice versa).[7] Thus, even if, *arguendo*, the INTELSAT system were used entirely for U.S. international traffic, COMSAT and all other U.S. users collectively would have access to no more than 50% of the system's capacity.

Of course, the *majority* of INTELSAT traffic does not involve the United States. Rather, INTELSAT space segment must be provided "*on a non-discriminatory basis to all areas of the world.*"[8] Moreover, as the Commission is well aware, the overburdened INTELSAT system now suffers from a critical shortage of available space segment capacity. Given these realities, PanAmSat's suggestion that COMSAT "has access to *100 percent* of the capacity on Intelsat's satellites," PanAmSat Comments at 2, is fanciful at best.

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[7] In a handful of exceptional cases, COMSAT also provides foreign half-circuits pursuant to agreements with other Signatories. However, the overall quantity of INTELSAT traffic for which COMSAT provides non-U.S. half-circuits is extremely small, and in any event has already been counted among the 17.01% of INTELSAT's space segment capacity that is provided by COMSAT.

[8] Agreement Relating to the International Telecommunications Satellite Organization INTELSAT Art. III(a), done Aug. 20, 1971, 23 U.S.T. 3813, 3819 ("INTELSAT Agreement") (emphasis added). *See also id.* Art. VIII(b)(v)(A), 23 U.S.T. at 3829 (requiring COMSAT to participate on an equal basis with Signatories from all 143 INTELSAT member nations for space segment allotments); INTELSAT Operating Agreement Art. 15, done Aug. 20, 1971, 23 U.S.T. 4091, 4109 (same).

For this reason, PanAmSat's analogy to its own situation is inapt. Certainly, "PanAmSat must pay a 100 percent space station fee even if it is able to lease only 20 percent of the capacity on one of *its* satellites." PanAmSat Comments at 2 (emphasis added). But that is because a PanAmSat satellite with only 20 percent of its capacity in use would nonetheless be a PanAmSat satellite. Here, in contrast, the FCC has stated that "Comsat does not even own the [INTELSAT] satellites," because "[t]he [INTELSAT] treaty plainly places ownership in Intelsat." Brief For Respondents FCC in *COMSAT Corp. v. FCC*, Docket No. 99-1412, at 39-40 & n.30 (D.C. Cir.) (filed Feb. 15, 2000) (citing INTELSAT Agreement Art. V, 23 U.S.T. at 3822; INTELSAT Operating Agreement Art. 3(b), 23 U.S.T. at 4094).[9] Accordingly, any fees imposed on COMSAT must necessarily be imposed on the basis of COMSAT's use of the INTELSAT system to provide service. *Cf.* 47 U.S.C. § 642(c) (enacted March 17, 2000) ("the Commission shall have the authority to impose similar regulatory fees on the United States signatory which it imposes on other entities *providing similar services*") (emphasis added). For this reason, there is no basis for imposing fees on COMSAT in connection with INTELSAT space segment capacity that is used by foreign entities to serve foreign jurisdictions.

B. The *Columbia Communications Corp.* Waiver Supports Proration Here.

PanAmSat correctly notes that regulatory fees generally have been assessed against geostationary satellite licensees on a "per satellite" basis. PanAmSat Comments at 1-2. But

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[9] As the Commission is well aware, COMSAT's view of its relationship with INTELSAT differs substantially from that of the FCC. Under either view, though, COMSAT is not obligated to pay the section 9 fees because it does not hold any space station licenses for the INTELSAT space stations. The FCC cannot simultaneously claim that COMSAT lacks an ownership interest in INTELSAT and also that it must pay these fees as INTELSAT's (sole) owner.

COMSAT, unlike PanAmSat or Columbia, is *not* a licensee, or even an operator, of the satellite facilities at issue. Rather, under ORBIT, COMSAT effectively now is merely a reseller of space segment capacity from satellites owned and operated by INTELSAT. *See* COMSAT Comments at 18-19 (discussing COMSAT's "reseller" role). No Commission precedent, including the *Columbia* precedent discussed by PanAmSat, has ever applied a Section 9 regulatory fee against a mere reseller of satellite capacity.

Moreover, PanAmSat misconstrues the significance of the *Columbia* case. In *Columbia Communications Corp.*, 14 FCC Rcd 1122 (1999), *discussed in* COMSAT Comments at 21-22, the Commission *reversed* a decision of the Associate Managing Director for Operations that had denied Columbia's request for partial waiver of its FY 1994 regulatory fee. *Id.* ¶ 1. In granting a 50% fee waiver to Columbia, the Commission relied, *inter alia*, on two key facts: (1) "the satellite capacity is not entirely within [Columbia's] control"; and (2) Columbia's transponder-sharing arrangement "predated the regulatory fee requirement by several years." *Id.* ¶ 2.

Both of these factors apply here. First, as discussed in COMSAT's Comments at 21-22 and above, only 17% of the satellite capacity of the INTELSAT system can plausibly be said to be within COMSAT's control.[10] Second, COMSAT's arrangements with INTELSAT and the other Signatories long predate the enactment of Section 9. Accordingly, proration similar to that adopted in *Columbia Communications Corp.* is warranted here.

PanAmSat's attempt to distinguish the *Columbia Communications Corp.* precedent is unpersuasive. *See* PanAmSat Comments at 2 n.2. According to PanAmSat, the *Columbia* fee

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[10] Moreover, because of "Level III direct access," *see* 47 U.S.C. § 641, that percentage is likely to diminish substantially over time.

waiver case is distinguishable because COMSAT's INTELSAT operations are not subject to preemption by other users of INTELSAT capacity. *Id.* PanAmSat's mental gymnastics, however, seek to put the cart before the horse. In fact, Columbia enjoyed a primary right to use virtually all of the satellite capacity of the satellites at issue in *Columbia Communications Corp.*, except on the rare occasions when such use was preempted by NASA. Here, in contrast, COMSAT has no primary right to operate INTELSAT and, in fact, cannot access the vast majority of INTELSAT's capacity because other users with an equal right to the capacity are already occupying it. In essence, COMSAT's use of INTELSAT is not "subject to preemption" only because the vast majority of INTELSAT capacity has *already been effectively "preempted"* by users other than COMSAT.

CONCLUSION

As discussed in COMSAT's comments, no Section 9 regulatory fees should be imposed on COMSAT in connection with INTELSAT space stations. If the Commission assesses any fees at all, such fees should be appropriately prorated. Neither PanAmSat nor GE Americom has raised any basis for departing from these conclusions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing comments of COMSAT Corporation was served by hand this fifth day of May, 2000, on:

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